

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: March 13, 1992
CASE NOS. 81-CTA-185,
79-CTA-241

IN THE MATTER OF

ONslow COUNTY,
NORTH CAROLINA.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER ON REMAND

This case arises under the Comprehensive Employment and Training Act (CETA or the Act), 29 U.S.C. §§ 801-999 (Supp. V **1981**), ^{1/} and its regulations, 20 C.F.R. Parts 675-680 (1990). The grantee, **Onslow** County, North Carolina, filed exceptions to the Decision and Order (D. and O.) of the Administrative Law Judge (ALJ) disallowing certain expended CETA funds because they were misspent. The Secretary declined to accept the case for review and the **ALJ's** decision became the final decision of the Secretary. See 20 C.F.R. § 676.91(f). The grantee appealed to the United States Court of Appeals for the Fourth Circuit. See 29 U.S.C. § 817. The court affirmed the findings that the grantee misspent various CETA funds, but concluded that the Secretary failed to perform a duty imposed by CETA Section 106(d)(2) to consider whether repayment should be waived, in

^{1/} CETA was repealed effective October 12, 1982. The replacement statute, the Job Training Partnership Act, 29 U.S.C. §§ 1591-1791 (**1988**), provides that pending proceedings under CETA are not affected. 29 U.S.C. § 1591(e).

whole or in part, in view of any special circumstances that might be shown by the grantee. Therefore, it remanded the case for a determination of whether repayment should be waived in view of the equitable considerations advanced by the grantee. Onslow County v. North Carolina v. United States Department of Labor, 774 F.2d 607, 614 (4th Cir. 1985).

BACKGROUND

During the period June 1, 1974, to March 31, 1979, the grantee received thirteen CETA grants totalling **\$5,375,795.00**. D. and O. at 2-3. The Grant Officer, in two final determinations, disallowed a total of **\$748,457.48**. D. and O. at 1. The parties stipulated prior to the hearing that there were thirteen disallowances at issue totalling **\$678,403.41**. D. and O. at 7-9. The **ALJ** found that five of these were improper, but upheld the remaining eight disallowances which amounted to **\$339,221.04**. D. and O. at 9-32, 37-40. With respect to the waiver of repayment issue, the **ALJ** stated that the only discretion he could exercise would be if the conditions in 20 C.F.R. § 676.88(c) ^{2/} were met. Transcript (T.) 280. He

^{2/} Section 676.88(c) provides:

(c) Allowability of certain questioned costs. In any case in which the Grant Officer determines that there is sufficient evidence that funds have been misspent, the Grant Officer shall disallow the costs, except that costs associated with ineligible participants and public service employment programs may be allowed when the Grant Officer finds:

(continued...)

concluded, however, that the regulation was on its face inapplicable because the amounts involved alone were too high to meet the condition of Section **676.88(c)(5)**. D. and O. **at 35 & n.8.**

On appeal, the grantee challenged six of the eight disallowances and sought waiver of repayment for all disallowances based on the circumstances of the case. Grantee's Brief at 27-48. The court upheld all of the disallowances, but concluded that the Secretary had neglected to perform the duty imposed by Section 106(d)(2) of CETA, 29 U.S.C. § 816(d)(2), **3/**

2/ (. ..continued)

(1) The activity was not fraudulent and the violation did not take place with the knowledge of the recipient or subrecipient; and

(2) Immediate action was taken to remove the ineligible participant; and

(3) Eligibility determination procedures or other such management systems and mechanisms required in these regulations, were properly followed **and** monitored; and

(4) Immediate action was taken to remedy the problem causing the questioned activity or ineligibility; and

(5) The magnitude of questioned costs or activities is not substantial.

3/ Section 106(d)(2) provides:

If the Secretary concludes that a public service employment program is being conducted in violation of [enumerated sections of the Act], or regulations promulgated pursuant to such sections, the Secretary shall, pursuant to paragraph (1) of this subsection, terminate or suspend financial assistance in whole or in part, order the repayment of misspent funds ... (unless. in view of special circumstances as

(continued...)

to consider whether the repayment remedy should be wholly or partially waived in view of any "special **circumstances**" that might be shown by the grantee. ^{4/} 774 **F.2d** at 612-13. The court then stated its agreement with the United States Court of Appeals for the Ninth Circuit that grantees are entitled, under the express provisions of the statute, to have the Secretary exercise discretion whether or not to waive repayment. **Id.** at 614, citing *Quechan Indian Tribe v. United States Department of Labor*, 723 **F.2d** 733, 736-37 (9th Cir. 1984).

DISCUSSION

In order to qualify for a waiver of repayment for misspent CETA funds, the grantee must demonstrate the existence of special circumstances. 29 U.S.C. § 816(d). CETA creates a presumption in favor of repayment and the exception to this rule is narrow. *Chicano Education and Manpower Services v. United States Department of Labor*, 909 **F.2d** 1320, 1327 (9th Cir. 1990).

To implement CETA Section 106(d) the Department of Labor

^{3/} (. ..continued)

demonstrated by the recipient, the Secretary determines that requiring repayment would not serve the purpose of attaining compliance with such sections), ...
[Emphasis added].

29 U.S.C. § 816(d)(2).

^{4/} The Secretary argued to the court that this duty had been delegated to the ALJ. The court concluded, however, that the **ALJ** had not considered the waiver issue. 774 **F.2d** at 614. Contrary to the court's finding, the ALJ addressed waiver but decided that it was not available under the applicable regulation. **See** discussion at pages 2-3 supra.

promulgated 20 C.F.R. § 676.88(c). See In the Matter of Blackfeet Tribe v. United States Department of Labor, Case No. 85-CPA-45, Sec. Dec. Dec. 2, 1991, slip op. at 4 & n.3.

Following the Fourth Circuit's decision in this case, the Ninth Circuit in Chicano had an opportunity to reconsider Quechag and noted that the Quechan court had not considered the effect of Section 676.88(c).' 909 F.2d at 1327. Chicano held that in considering the waiver of repayment issue under Section 106 (d)(2), the Department of Labor is only required to take into account those specific equitable factors listed in Section 676.88(c), but may also consider "factors not covered by the regulation." Id.

As a general rule, there is no discretion to waive repayment of disallowed costs unless the grantee has satisfied all the criteria of Section 676.88(c). In the Matter of U.S. Department of Labor v. City of Tacoma, Washinaton, Case No. 83-CTA-288, Sec. Dec. Jun. 26, 1991, Slip op. at 6. There is an exception in that a grantee need not satisfy a particular element of Section 676.88(c) where it would be impossible. In that instance, waiver is still permissible if the grantee has satisfied the remaining elements, has exhibited good faith, and complied with applicable regulations. In the Matter of Louisiana Denartment of Labor, Case No. 82-CPA-32, Sec. Dec. Aug. 23, 1990, slip op. at 4.

A. Ineliable Teacher Aides

The **ALJ** upheld the disallowance of \$25,465.93 spent on the

employment of 27 teacher aides who had been hired in the fall of **1977** and paid with anti-recessionary fiscal assistance (AFA) funds, provided pursuant to Title II of the **Public** Works Employment Act of 1976, 42 U.S.C. §§ 6721-6736 (1988). When the funding ran out in the spring of 1978, the grantee's manpower **director** testified that he consulted with a Department of Labor representative who told him that the teacher aides could be transferred to CETA Title VI positions for one more quarter. T. 73. The **ALJ** concluded that the advice was incorrect as the applicable regulation, 29 C.F.R. § 99.42(b)(3),(4) (**1981**), permitted transfers only for those, unlike the teacher aides, who were employed under the Emergency Employment Act and the Public Works and Economic Development Act, and then only if a maximum effort had been made to place such individuals in unsubsidized employment or training. The ALJ also found that the teacher aides did not meet the general eligibility criteria of 29 C.F.R. § 99,42(b)(1) (1981). D. and O. at 13, 37.

The grantee argued that transfer should have been permitted because there is no basis for distinguishing between the AFA program and those programs referenced in Section **99.42(b)(3)** and **(4)**. Grantee's Brief at 39. The regulation is clear, however, and the grantee's mere allegation that it should have included programs such as the AFA is insufficient to require that it be interpreted in that manner.

The grantee **also** contended that the expenditure for teacher aides should have been allowed because they satisfied the

eligibility criteria for 29 C.F.R. § 99.42(b), even though less than fifty percent of the Title VI employees satisfied the 29 C.F.R. § 99.42(a) criteria. See 29 C.F.R. § 99.40(b) (1981). Grantee's Brief at 39-40. The teacher aides did not meet the Section **99.42(b)(1)** criteria, however, because they were not unemployed for the requisite period prior to commencing their Title VI employment. ^{5/} See T. 73-75; Grantee's Brief at 38.

Because the grantee did not comply with the eligibility requirements for employment of the teacher aides, it did not satisfy element three of the waiver criteria. 20 C.F.R. § **676.88(c)(3)**. Accordingly, there is no discretion to waive repayment of this expenditure. See City of Tacoma, slip op. at 6.

B. Shifting of Funds from One Year to Another

The ALJ upheld disallowances of **\$126,562.09** pertaining to funds shifted from fiscal year 1977 to fiscal year 1978 at the suggestion of a federal representative. D. and O. at 15, 38. As the Grant Officer argued before the court of appeals, see Grant Officer's Brief at 40 n.29, shifting of funds from one grant to another to overcome funding deficiencies or avoid restrictions imposed by law is proscribed by the applicable regulations. 29

^{5/} A Department of Labor auditor testified that transfer was permissible if the individuals had been eligible for Title VI employment when first hired with AFA funds. T. 212-13. I disagree. If an individual is not eligible for transfer, as here, the regulations plainly **require** a period of unemployment or underemployment immediately prior to the application for participation in Title VI.

C.F.R. § 95.14(b)(3)(i)(B) (1981); 41 C.F.R. §§ 1-15.703-2(b), 1-15.713-9, 29-70.103 (1981). See In the Matter of Oro Development Corporation v. U.S. Department of Labor, Case No. 86-JTP-6, Sec. Dec. Feb. 1a, 1988, slip op. at 9-10. Failure to comply with these required management mechanisms precludes the grantee from satisfying element three of the waiver criteria. 20 C.F.R. § 676.88(c)(3). Moreover, although the term "substantial" in element five is nowhere defined, the magnitude of the disallowances in this category would probably be considered substantial. 20 C.F.R. § 676.88(c)(5). There is therefore no discretion to waive repayment of this amount.

C. Payment to Participants from Administrative Funds

The ALJ concluded that \$57,497.95 was properly disallowed as payments to participants from administrative funds while they were not performing administrative duties. D. and O. at 16, 35. The grantee has conceded that it knew these payments were improperly made from the administrative account at the time they were made. Grantee's Brief at 42. This precludes satisfaction of waiver element one as it demonstrates that the violation took place with the knowledge of the grantee. 20 C.F.R. § 676.88(c)(1). These disallowances, therefore, cannot be waived.

D. Failure of Purchasing Practices to Comply with Procurement Standards

Finding that the grantee's purchasing practices in relation to a beach restoration project did not comply with applicable federal standards, the ALJ upheld disallowances of **\$30,382.79**. D. and O. at 16-18, 38. There is no discretion to waive repayment of this amount as the waiver provision of Section **676.88(c)** applies only to misspent funds associated with public service employment programs and ineligible participants. In the Matter of United States Department of Labor v. Rockingham/ Strafford Employment and Training Consortium, Case No. **81-CTA-363**, Sec. Dec. Mar. 11, 1991, slip op. at 4; In the Matter of Central Tribes of the Shawnee Area. Inc. v. U.S. Department of Labor, Case No. **85-CPA-17**, Sec. Dec. Dec. 14, 1989, slip op. at 3-5.

E. Day Care Allowances

The **ALJ** upheld the disallowance of **\$41,195.10** paid as day care allowances to participants who attended Title I classroom training. D. and O. at 19-21, 38-39. Inasmuch as the expenditures involved allowances for those attending classroom training rather than costs associated with ineligible participants and public service employment programs, there is no discretion to waive repayment under Section 676.88(c). See Central Tribes, slip op. at 4.

F. Enrollment in Violation of Antinepotism Rule

The **ALJ** also upheld the disallowance of **\$16,240.59** paid as a salary to the assistant manpower director's sister. The **ALJ** found that hiring this individual violated the antinepotism regulation, 29 C.F.R. § 98.22(a) (1981), even though the hiring decision was made by a county school and not the grantee itself. D. and O. at 21-22, 39. The grantee did not appeal this ruling and I see no reason to question it, as the regulation is broadly drafted to encompass hiring by grantees, subgrantees, contractors and employing agencies. Failure to comply with the eligibility determination procedure in Section 98.22(a) precludes the grantee from satisfying waiver element three, 20 C.F.R. § 676.88(c)(3), and eliminates the discretion to waive repayment of this amount.

G. Ineligible Participants

Based on the grantee's failure to follow various eligibility guidelines, the **ALJ** upheld disallowances of **\$40,632.59** paid to ineligible participants. D. and O. at 23-31, 39. Inasmuch as these disallowances were based on failure to comply with applicable eligibility determination procedures, the grantee cannot satisfy waiver element three, 20 C.F.R. § 676.88(c)(3), and there is, therefore, no discretion to waive repayment of these amounts.

H. Overnavment to Contractor

The **ALJ** upheld a disallowance of **\$1,244.00** paid to a

contractor based on its failure to pay that amount due as wages to a CETA participant. The ALJ acknowledged that the participant had executed an affidavit stating that the matter involving his wages had been satisfactorily settled, but noted that the amount of the disallowance was not specified in the affidavit, see Post Hearing Exhibits, Vol. IV, Exhibit 7, and, therefore, the grantee had not carried its burden of showing that the disallowance was in error. D. and O. at 32, 39. The grantee did not appeal this finding and, despite the **ALJ's** identification of the problem, it failed to take action to remedy the problem. Accordingly, there is no discretion to waive the payment of this amount as the grantee does not satisfy waiver element four, 20 C.F.R.

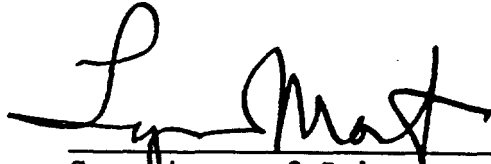
§ 676.88(c)(4).

CONCLUSION AND ORDER

For the foregoing reasons, I find that there is no discretion to waive repayment of any of the disallowed expenditures because, where applicable, the grantee has failed to achieve the threshold requirement of satisfying all of the waiver criteria of 20 C.F.R. § 676.88(c) for any of the disallowances. In the remaining instances, Section 676.88(c) does not allow waiver of repayment. The grantee, **Onslow** County, North Carolina, is therefore ordered to pay **\$339,221.04**, the total of disallowed expenditures upheld by the ALJ, to the Department of Labor.

This payment shall be from non-Federal funds. Milwaukee County,
Wisconsin v. Donovan, 771 F.2d 983, 993 (7th Cir. 1985).

SO ORDERED.


Secretary of Labor

Washington, D.C.

CERTIFICATE OF SERVICE;

Case Name: In the Matter of Onslow County, North Carolina

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Document : Final Decision and Order on Remand

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